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89- 1397

Supreme Court, U.S.
FILED
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

HUMBERTO SERGIO GARZA,
GARY BEN JORDAN & NOE MUNIZ, PETITIONERS

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONERS

February 25, 1990

QUESTIONS PRESENTED FOR REVIEW

First: The Court of Appeals reversibly erred in not sustaining petitioners' point of error no. 3, which read (Pet.App. 32):

> As to each appellant, the district court reversibly erred in imposing a $50.00 special monetary assessment pursuant to 18 U.S.C. 3013 (1R. 168-171b), since that 1984 revenue——raising special assessment measure, which originated in the Senate, is in violation of the U.S. Constitution's Article 1, § 7, cl. 1, which provides all revenue bills must originate in the House.

Second: The Court of Appeals reversibly erred in finding harmless under Federal Rule Criminal Procedure 52(a) the prosecutor's improper statement during final jury argument (18R. 2000), since the Government failed to prove beyond a reasonable doubt that the verdict was not affected by that prosecutorial unconstitutional remarking that the trial judge would have directed verdict of acquittal and the case would not be with the jury if there were not

sufficient evidence, if believed, from which the jury could convict.

Third: The Court of Appeals erred in not sustaining petitioner's point of error no. 2, which read (Pet.App. 32):

> The district court erred on failing to grant appellant's mistrial request upon jury misconduct (16R. 1845-1854). (See also 13R. 1239-1245; 14R. 1499-1501; 17R. 1806-1854; 16R. 1727-1731).

LIST OF ALL PARTIES BELOW

The original parties before the United States Court of Appeals for the Fifth Circuit were: The United States of America and Petitioners Humberto Sergio Garza, Gary Ben Jordan, and Noe Muniz.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioners' undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioners were represented at trial by attorney Joe A. Cisneros and at the Court of Appeals by attorneys Joseph A. Connors III, Joe A. Cisneros and Dorina Ramos.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

HUMBERTO SERGIO GARZA,
GARY BEN JORDAN, and NOE MUNIZ,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court:

HUMBERTO SERGIO GARZA, GARY BEN JORDAN, and NOE MUNIZ petition for review of the judgment, opinion and rehearing denial of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The district court's judgment is unreported (Pet.App. 13-25). The appeals court's opinion and rehearing denial (Pet.App. 3-12) are reported. United States

v. Garza, 887 F.2d 55 (CA5 1989), rehearing denied (1989).

JURISDICTION

The court of appeals entered its opinion on October 12, 1989 (Pet.App. 3-10). That court denied Garza, Jordan and Muniz' timely petition for rehearing on November, 1989 (Pet.App. 11-12). Within the 90 day period following November 27, 1989, this petition was mailed for filing by the Clerk of this Court. Supreme Court Rule 13.1. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall

be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Article 1, Section 7, Clause 1 of the United States Constitution reads:

> All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

RELEVANT STATUTES

18 U.S.C. 924(a) provided from 1971 through November 14, 1986 as follows:

> (a) Whoever violates any provision of this chapter or knowingly makes any false statement or representation with respect to the information required by the provisions of this chapter to be kept in the records of a person licensed under this chapter, or in applying for any license or exemption or relief from disability under the provisions of this chapter, shall be fined not more than $5,000, or imprisoned not more than five years, or both, and shall become eligible for parole as the Board of Parole shall determine.

18 U.S.C. 3013 reads:

> (a) The court shall assess on any person convicted of an offense against the United States—
>
> (1) in the case of a misdemeanor—
>
> (A) the amount of $25 if the defendant is an individual; and
>
> (B) the amount of $100 if the defendant is a person other than an individual; and
>
> (2) in the case of a felony—
>
> (A) the amount of $50 if the defendant is an individual; and
>
> (B) the amount of $200 if the defendant is a person other than an individual.
>
> (b) Such amount so assessed shall be collected in the manner that fines are collected in criminal cases.

RELEVANT RULES

Federal Rule of Criminal Procedure 52 reads:

(a) Harmless Error. Any error, defect, irergularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF THE CASE

A. Appeals Court's Jurisdiction

The court of appeals had jurisdiction of petitioners' direct appeal by virtue of 28 U.S.C. 1291.

B. Procedural History In District Court

Humberto Sergio Garza, Gary Ben Jordan, and Noe Muniz were charged together with Margarito Alvarez, Urbano Arredondo III, Jose Fernando Moraida, Victor Munoz, Fernando Pena, and Ciro Angel Rivera in a 62 count indictment (1R. 1 at 1-18). Count 1 alleged a conspiracy to make false statements and representations to a federally licensed firearms dealer, in violation of 18 U.S.C. 924(a) and 371 (1R. 1

at 1-10). Against Gary Ben Jordan, Counts 2-19 alleged making false statements and representations to a federally licensed firearms dealer, in violation of 18 U.S.C. 924(a) and 2 (1R. 1 at 10-12). Against Humberto Sergio Garza, Counts 20-41 alleged making false statements and representations to a federally licensed firearms dealer, in violation of 18 U.S.C. 924(a) and 2 (1R. 1 at 12-14). Against Noe Muniz Counts, 42-59 alleged making false statements and representations to a federally licensed firearms dealer, in violation of 18 U.S.C. 924(a) and 2 (1R. 2 at 14-16). The case proceeded to a jury trial before the Honorable Filemon B. Vela, presiding judge of the McAllen Division of the United States District Court for the Southern District of Texas. Jury selection was on March 4, 1988 (2R. 1). On March 21, 1988, the trial on the merits was to begin (2R. 27). It began the next day (3R. 58).

Humberto Sergio Garza was found guilty as to Counts 1, 20-23, and 25-40 on April 1, 1988 (1R. 170). Mr. Garza's total sentence imposed was 10 years in custody of the Attorney General and a $21,000 fine; 537 days to serve, the balance of the imprisonment sentence suspended for five years probation with supervision, to commence upon release from confinement (1R. 170). Pursuant to 18 U.S.C. 3013, the Court further imposed a $50 special monetary assessment on each of Counts 1, 22, 23, 26, 30-33, 37, 39, and 40, for a total of $550 (1R. 169). On March 28, 1988, Counts 24 and 41 were dismissed on the Government's own motion (1R. 169).

Gary Ben Jordan was found guilty as to Counts 1-18 on April 1, 1988 (1R. 171a). Mr. Jordan's total sentence was 10 years custody of the Attorney General and a $18,000 fine; 537 days to serve, the balance of the imprisonment sentence suspended for

five years probation with supervision, to commence upon release from confinement (1R. 171a). Pursuant to 18 U.S.C. 3013, the Court further imposed a $50 special monetary assessment on each of Counts 1-3, 7, 8, 10, and 14-18, for a total of $550 (1R. 171b). Count 19 was dismissed on the Government's motion on March 28, 1988 (1R. 171b).

Noe Muniz was found guilty as to Counts 1, and 42-59 on April 1, 1988 (1R. 172a). Mr. Garza's total sentence was 10 years custody of the Attorney General and a $19,000 fine; 537 days to serve, the balance of the imprisonment sentence suspended for five years probation with supervision, to commence upon release from confinement (1R. 172a). Pursuant to 18 U.S.C. 3013, the Court further imposed a $50 special monetary assessment on each of Counts 1, 43, 51-57, and 59, for a total of $500 (1R. 172b). This timely appeal followed.

C. Statement of the Facts: Defendant's Case

Mr. Muniz took the stand on his own behalf and testified to the effect that he did not in any way conspire with Mr. Humberto Sergio Garza or with Mr. Gary Ben Jordan or with Mr. Fernando Pena or with Mr. Victor Munoz or with Mr. Jose Fernando Moraida or with Mr. Margarito Alvarez, or with anybody else to have people come and sign the forms in blank and use them later to sell guns to people not eligible to buy (16R. 1619).

Mr. Garza also took the stand on his own behalf and testified to the effect that he was not involved in any conspiracy in 1981, or from March 1982 to July 1984, or from December 1982 to April 1986, and that he was not involved in having any forms signed in blank (17R. 1746, 1749, 1750-1752, 1756, 1759, 1768).

Mr. Jordan also took the stand on his own behalf and testified to the effect that he did not conspire to do anything the government is alleging in the indictment (16R. 1700).

D. Prosecutor's Improper Closing

During the course of the final argument, the following occurred when the prosecutor made the following statements (18R. 2000-2002):

> Mr. Ramirez indicated that there was not enough evidence from which any jury could convict the defendant, Moraida, and that if any jury convicted him, they would be convicting an innocent man. I am here to assure you that if there were not sufficient evidence, Judge Vela would have directed a verdict of acquittal and this matter would not --
>
> MR. YZAGUIRRE: We ask for mistrial on that, Your Honor. Now that is --
>
> THE COURT: Objection is overruled. Motion is denied. Ladies and gentlemen of the jury, any time that the attorneys make reference to the law and it is not consistent with that which I give

you, you are to disregard what the attorneys told you.

MR. CISNEROS: With all due respect to this honorable jury, I strongly object on the grounds that he has implanted in the minds of these jurors the Court has determined that there is sufficient evidence to convict, Your Honor. At this time we ask the Court to instruct the jury to disregard that comment.

THE COURT: Request is denied.

MR. CISNEROS: Now we move for a mistrial.

THE COURT: Request is denied.

MR. YZAGUIRRE: Note our exception.

MR. MILNER: I feel compelled to complete my remark because it was incomplete. Were there not sufficient evidence, which if you believe it to be true, could support a verdict of guilty in this case, the matter would not be before you. Now, whether you believe it or not --

MR. CISNEROS: Again object.

MR. YZAGUIRRE: Please caution the U.S. Attorney --

MR. CISNEROS: I ask the Court again to instruct the jury to disregard vigorously and also, Your

Honor, at this time move for mistrial?

THE COURT: Denied. Objection is overruled.

MR. CISNEROS: My request for mistrial is denied also?

THE COURT: Denied.

E. The Prejudiced Jury

On March 28, 1988, juror Tabarez met with the Judge Vela in chambers, and in the absence of counsel, discussed some information relayed to her by a friend about a possible bribe. That chambers colloquy follows (13R. 1239-1244):

JUROR TABAREZ: I thought -- I didn't want to. Nobody had approached me. Just my friend told me -- told me that--

THE COURT: Don't be concerned about it. Don't be nervous. Don't worry about it. I just want to assure you did the correct thing, because it is very important that we decide things exclusively from evidence, you understand, in the case devoid of any other influences. That is the thing I want to question you about. Did this experience in any way affect your ability to be fair and impartial?

JUROR TABAREZ: Oh, no. No. No. No.

THE COURT: Can you make up your mind from the evidence --

JUROR TABAREZ: Oh, yes.

THE COURT: -- in the case?

JUROR TABAREZ: I told my friend not even the fourteen million dollars that he claims he has on his inventory would change my mind to go against -- I am fair. If he is guilty he is going to be found guilty. If he is not, he is going to be --

THE COURT: I have to ask you some questions obviously. Number one, who is your friend?

JUROR TABAREZ: Maria Howard.

THE COURT: Where does she live?

JUROR TABAREZ: She lives in Rio Grande.

THE COURT: Rio Grande?

JUROR TABAREZ: Yes.

THE COURT: Is she related to you?

JUROR TABAREZ: No, she is just a friend.

THE COURT: Are you from Rio Grande?

JUROR TABAREZ: No, I am from Mission.

THE COURT: What is it your friend said?

JUROR TABAREZ: She said -- we were at the bingo game. At the bingo. I go to the bingo a lot when I have a chance. I haven't had a chance all week, so I went yesterday. We all sit together.

She said, "Oh, I have got something to tell you." I was busy. I had a cup of coffee I had to take to someone.

I said, "Okay, I will be right back."

And she said, "You know I have this friend." I don't know where she said she was from. I think she said Rio Grande. She didn't tell me her name.

She said, "This friend is going to the same jury you are going," or something like that. She said something like that.

She is not a witness or nothing. Just comes to listen.

THE COURT: Spectator?

JUROR TABAREZ: Yes. And she said, "I have a friend that's going. She is a juror. My friend told her because she knows I come to the"--

THE COURT: But the person to whom this Howard was speaking is not a juror?

JUROR TABAREZ: No. No. No. No.

THE COURT: And did she give you the name?

JUROR TABAREZ: No. I didn't ask her.

THE COURT: What did she say the friend told her?

JUROR TABAREZ: She said, "Oh, you have a friend. I wonder if your friend would sell herself." Not sell. Vendese.

THE COURT: Lend herself.

JUROR TABAREZ: Yes. "And she would make a lot of money."

THE COURT: Vendese means sell.

JUROR TABAREZ: Turn for the other side. "She would make a lot of money."

And my friend told her, "I don't think so. I don't think she would want that."

Then she came to tell me. What I told her, just joking, I said not even the fourteen million Mr. Pena has would make me change to their side," you know. "If he is found guilty, he is going to be found guilty. If he is going to be found

not guilty, he will be found not guilty. All depends on what they have to say."

THE COURT: Do you have any problems?

JUROR TABAREZ: No.

THE COURT: Has it affected you?

JUROR TABAREZ: No, sir. I just thought I would report it.

THE COURT: You did the correct thing. Let me ask you something else. All right. This information that you received sort of indicates somebody who may not even know, you understand, the persons in this case, who may not have anything to do with it, but may have been from one side.

JUROR TABAREZ: You know, I told her, I asked her, "Is she the family?" She said, "No. No. No. She is just just" --

THE COURT: Here is what my question is to you: Did this in any way affect your ability to be fair and impartial?

JUROR TABAREZ: Oh, no. No. No, sir. I am listening to the witnesses.

THE COURT: Only the evidence?

JUROR TABAREZ: Yes.

THE COURT: Let me go a little further. All right. The suggestion comes from one side of the parties in this case. The Government is one side and the defendants is one side.

JUROR TABAREZ: I know.

THE COURT: Obviously it comes from the defendants. Would you hold that against them --

JUROR TABAREZ: No.

THE COURT: -- the fact that you have been approached?

JUROR TABAREZ: No. I haven't been approached, you know. My friend just told me.

THE COURT: So it hasn't affected you in any way?

JUROR TABAREZ: No.

THE COURT: You have done the correct thing. Do you happen to have Mrs. Howard's address?

JUROR TABAREZ: No, I sure don't. I can get it for you.

THE COURT: We will do that subsequently. Right now just lend yourself and continue to keep an open mind in the case.

JUROR TABAREZ: Okay.

THE COURT: Thank you so very much. Thank you. You did the correct thing, ma'am.

Later on outside the jury's presence, Judge Vela informed the defendants and all counsel as to what had occurred, and as to his finding that it had not tainted juror Tabarez. That colloquy follows (14R. 1499-1501):

> THE COURT: ...
>
> Now gentlemen, it is my duty to report a matter that came to my attention that I made a record of. And I am glad that the spectators are here. For I am not going to tolerate any more of this kind of nonsense. And I am going to deal with it directly. I have made a record of it, it is going to follow this case. It is preserved. I am satisfied that it has not tainted a juror.
>
> I have received information, only myself. I have made a record, placed of record, to the effect that a juror was approached by a person who had been approached who was a spectator in this case. I'm not saying it's for the Government or for the defendant. I am not saying there is anything -- it's anybody that's involved in this case. This is the third incident that has some similarity to this case being affected by outside influences. I had a Grand Jury situation regarding some tampering of witnesses. I am not saying any of the defendants had

anything to do with it. I had a situation, of course, which you had no control over of the newspaper that I had to deal with, and now I have this matter involving a juror.

I am not going to sequester a jury. But if I get one more incident of this type, I am telling you now, I will declare a mistrial and I will sequester everybody until we try this case in Houston, Texas. I am not going to tolerate any more of that kind of nonsense. I am going to do what is necessary to make sure that justice is done.

I am not directing myself nor addressing myself to any individuals, nor assessing responsibility for this kind of thing. You are simply being advised and informed of something that is of record that is not going to be tolerated. You do what you think is necessary. I have already told you what I am going to do.

MR. CISNEROS: May it please the Court, based on that information on the record, now come the defendants, Humberto Sergio Garza, Noe Muniz, Ben Jordan, and Fernando Pena, and move for a mistrial, Your Honor, on the grounds, whatever may have happened, I must conclude you know that maybe the jury is prejudiced now and has been inflamed.

THE COURT: Your motion will be denied. You preserve your exception. I've just told you what

I am going to do if we get one more incident.

Prior to the end of trial testimony, outside the presence of the defendants and defense counsel, Judge Vela asked juror Tabarez if she had made this information known to any of the other jurors (17R. 1813). She said she had. Judge Vela then questioned each and every juror as to the information made known to them, and as to their ability to remain fair and impartial (17R. 1815-1843). Judge Vela was satisfied with the jurors' responses and with their ability to remain fair and impartial (17R. 1843-1844). Judge Vela denied defense counsel's request for a mistrial (17R. 1845, 1846, 1854). Judge Vela also allowed juror Taberez to serve on the deliberating jury that convicted (17R. 1847; 18R. 2042).

SUMMARY OF ARGUMENT ON REASONS FOR REVIEW

Under Supreme Court Rule 10.1(a), the Supreme Court should exercise its judicial

discretion and allow the writ in this case because:

(a) as to the first question presented here, the Fifth Circuit Court of Appeals has rendered a decision consistent with United States v. Herrada, 887 F.2d 524 (CA5 1989) but in conflict on the same matter with the decision in United States v. Munoz-Flores, 863 F.2d 654 (CA9 1988), cert. granted, ___ U.S. ___, 110 S.Ct. 48, 107 L.Ed.2d 17 (1989);

(b) as to the second question presented here, the Court of Appeals relied exclusively on an analysis under Federal Rule Criminal Procedure 52(a) in conflict with the applicable Chapman decisions of this Court, such as Satterwhite v. Texas, 486

U.S. ___, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988); and

(c) as to the second and third questions presented here, not only has the Court of Appeals sanctioned a lower court departure from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision, but the Court of Appeals has also decided important questions of federal law which have not been, but should be, settled by this Court.

ARGUMENT ON FIRST QUESTION

In an effort to not lengthen this petition, petitioners adopt in toto the dispositive opinion on this issue in United States v. Munoz-Flores, 863 F.2d 654 (CA9 1988), cert. granted, ___ U.S. ___, 110 S.Ct. 48, 107 L.Ed.2d 17 (1989) as well as

all the arguments made by respondent Munoz Flores in this Court's cause no. 88-1932. Of course, petitioners recognize that that Ninth Circuit decision also conflict with not only the decision herein but also the decision in United States v. Herrada, 887 F.2d 524 (CA5 1989). This constitutionality question about 18 U.S.C. 3013 was not before the Supreme Court in Ray v. United States, ___ U.S. ___, 107 S.Ct. 2093, 95 L.Ed.2d 693 (1987)[where the Court of Appeals improperly invoked "concurrent sentence doctrine" since defendant was not serving concurrent sentences where each sentence contained its own $50.00 special monetary assessment].

ARGUMENT ON SECOND QUESTION

This issue's resolution turns on which harm analysis is applicable here: Chapman or Federal Rule Criminal Procedure 52(a).

The Court of Appeals found the prosecutor's closing argument in question to be in error but to be harmless. The Court

of Appeals found that the improper argument applied not to these Petitioners but to another trial co-defendant. In so ruling, the Court of Appeals ignored jury common sense that the trial court would have acquitted for these Petitioners "if there were not sufficient evidence * * * * which if you believe it to be true, could support a verdict of guilt in this case, the matter would not be before you." (18R. 2000-2002).

Petitioners possessed a valuable trial right for the trial jury not to be told of the district or appellate court's acquittal obligations [under Federal Criminal Rule Procedure 29 and Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and Greene v. Massey, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978)]. Such jury argument must impinge on the due process rights to a fair and impartial jury guaranteed Petitioners by the Fifth and Sixth Amendments to the U.S. Constitution.

Such holding is just one step away from this Court's Eighth Amendment holding that a prosecutor reversibly errs in arguing to a capital sentencing jury that theirs is not the final decision but that their job is reviewable since it minimizes the jury's role and diminishes its sense of responsibility. See Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Petitioners conclude that while each Petitioner faced numerous counts each with a five year potential sentence, that does not mean that Petitioners were owed by the Government either less due process or less fair of a jury since death was not an available punishment.

Petitioners conclude that when viewed in the context of the trial as a whole and each Petitioner's trial testimony asserting innocence, this Court cannot say beyond a reasonable doubt that the challenged

prosecutorial argument (about acquittal by the district court or the case would not have been presented to the jurors) did not affect the jury's decision to convict. See Satterwhite v. Texas, 486 U.S. ___, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988)[reversal since the state had not proved beyond a reasonable doubt that the error complained of did not contribute to the verdict]. See also United States v. Young, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985)[trial court conviction affirmance since under "plain error" standards the challenged improper arguments by the prosecutor did not undermine the jury trial's fairness].

It is well settled that no attorney including prosecutors may express personal opinion as to the credibility of any witness, United States v. Rodarte, 596 F.2d 141 (CA5 1978); United States v. Morris, 568 F.2d 396 (CA5 1978), or comment on the evidence, United States v. Kopituk, 690 F.2d

1289 (CA11 1982). It will at all times be improper for a prosecutor to suggest that a defendant is guilty from the mere fact that he has been indicted or is being prosecuted. United States v. Bess, 593 F.2d 749 (CA6 1979).

It is absolutely inexcusable for a prosecutor to make any prejudicial statement. United States v. Bess, supra. The duty of a prosecutor is clear. The Supreme Court in Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935) states it quite clear:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he

> is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Justice Douglas stated it just as clearly in his dissenting opinion in Donnelly v. DeChristoforo, 416 U.S. 637, 648-649, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974), saying:

> The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.

Here, the improper statement of the prosecutor cannot be ruled as harmless. Just as it is improper for a prosecutor to suggest that a defendant is guilty merely because he is being prosecuted or has been indicted, it would also be improper for a prosecutor to suggest that there is sufficient evidence for a conviction since the judge failed to a give a judgment of

acquittal (18R. 2000), as to any accused on trial. The trial judge's conduct as to one defendant (whose case is being submitted to the jury for resolution rather than judicially acquitted) must in the jury's mind be equivalent to the trial judge's decision not to acquit other co-defendants but to also submit their cases to the jury. Compare, United States ex rel. Clark v. Fike, 538 F.2d 750, 759 (CA7 1976), cert. denied, 429 U.S. 1064, 97 S.Ct 791, 50 L.Ed.2d 781 (1977); United States v. Bowen, 500 F.2d 41 (CA6 1974), cert. denied, 419 U.S. 1003, 95 S.Ct. 322, 42 L.Ed.2d 278 (1974); United States v. Lamerson, 457 F.2d 371, 372 (CA5 1972). The prosecutor's statements amounted to the same thing as advising the jury that the judge is expressing his opinion that the defendants are guilty. See United States v. Diharce-Estrada, 526 F.2d 637 (CA5 1976). The prosecutor added this statement: "Were

there not sufficient evidence, which if you believe it to be true, could support a verdict of guilty in this case, the matter would not be before you." (18R. 2001). Such a statement did not in any way lessen the damage already done.

Although requested by defense counsel, the court refused to give any kind of instruction and failed to rule on the timely objection. Mr. Garza, Mr. Jordan, and Mr. Muniz's substantial right to a fair trial was substantially affected by the prosecutor's statement. The jury convicted on the prosecutor's statement that had there not been enough evidence to convict, the judge would have already acquitted the defendants. Mr. Muniz, Mr. Garza, and Mr. Jordan denied any involvement in any conspiracy (16R. 1619, 1700; 17R. 1746, 1749, 1750-1752, 1756, 1759, 1768). This Court can not say that the evidence is overwhelming. The jury deliberated for two

days. The jury's deliberations did not go smoothly (19R.). The jury sent out several notes. The last one expressed that they did not believe they could continue deliberations (19R. 2044, 2047, 2058, 2060, 2065, 2066). Accordingly, justice demands that the convictions be reversed.

ARGUMENT ON THIRD QUESTION

It has long been held that unauthorized third party extra-record contact, with a juror is "deemed presumptively prejudicial." Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954). The government may rebut the presumption by showing that the communication was harmless. Sher v. Stoughton, 666 F.2d 791, 793 (CA2 1981). To make such a determination, it is necessary to consider not only the content of the communication itself, but also "the other information of which the jurors were properly aware." Sher v. Stoughton, supra at 794. Judge Friendly in United States ex rel.

Owen v. McMann, 435 F.2d 813 (CA2 1970) stated it as follows:

> "The touchstone of decision in a case such as we have here is thus not the mere fact of infiltration of some molecules of extrarecord matter, ... but the nature of what had been infiltrated and the probability of prejudice."

The communication of a potential bribe to all members of a jury is no petty matter. The bribe could only be coming from one of the accuseds' supporters. This information was conveyed to twelve of the fourteen jury members by juror Tabarez and inferentially to the remaining two jurors by Judge Vela's inquiries. It cannot possibly be conceived that each member of the jury remained unprejudiced in all ways. Any rational jury member would conceive this "bribe talk" to be some indication or evidence of guilt.

The Sixth Amendment guarantees a defendant a right to a trial by an impartial jury. No right touches more the heart of fairness in a trial. That fact that there

was no bribe, no threat, no invasion of the jury deliberations, does not eliminate the fact that something went sour, and that a mistrial should have been declared. See Stockton v. Commissioner of Virginia, 852 F.2d 740, 743 (CA4 1988). "Private communications, possibly prejudicial, between jurors and third person, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Mattox v. United States, 146 U.S. 140, 150, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1892).

Anytime the issue is raised as to the propriety of a jury's conduct, it is the responsibility of the trial judge to make sure the verdict is not in any way prejudiced by improper outside influences. Sheppard v. Maxwell, 384 U.S. 333, 362-363, 86 S.Ct. 1507, 1522, 16 L.Ed.2d 600 (1966). This may be accomplished by means of in

camera juror interviews, and it will be the duty of the trial court to judge the credibility of each juror, distinguish the believable from the unbelievable, and determine the content, cumulative nature, and extent of the outside information that reached the jury room. See Smith v. Phillips, 455 U.S. 209, 216, 102 S.Ct. 940, 945, 71 L.Ed.2d 78 (1981); Williams v. Griswald, 743 F.2d 1533, 1538 (CA11 1984). In the case at hand, each and every juror gave Judge Vela the proper answer as to their capability of being fair and impartial, and on this alone Judge Vela based his findings. It may well be that each juror believed that they could be fair and impartial, but it may also well be that one juror may have been prejudiced by this information. This being the case, justice would demand that the convictions be reversed.